U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 24 February 2005

CASE NO. 2003-LHC-01865

OWCP NO. 18-76879

In the Matter of:

LOUIE L. BROWN,
Claimant,

vs.

MANSON CONSTRUCTION COMPANY

and

EAGLE INSURANCE COMPANIES,
Employer/Carrier
Respondents,

and

CONNOLLY PACIFIC COMPANY

and

ALASKA NATIONAL INSURANCE COMPANY,
Employer/Carrier
Respondents,

Appearances: Howard D. Sacks, Esq.
For the Claimant

Robert W. Nizich, Esq.
For the Claimant

Barry W. Ponticello, Esq., Trovillion, Inveiss, Ponticello & Demakis
For Respondents Manson Construction Company and Eagle Insurance Company

Michael D. Doran, Esq., Samuelsen, Gonzalez, Valenzuela & Brown
For Repondents Connolly Pacific Company and Alaska National Insurance Company

Before: William Dorsey
Administrative Law Judge

Decision and Order Denying Reconsideration and Awarding Attorney's Fees

Background

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended (the Act), 33 U.S.C. § 901 *et seq.* The Decision and Order Awarding Benefits (Decision) of September 22, 2004 found Manson Construction Company/Seabright Insurance Company (Manson) to be the "last responsible employer," liable for Claimant's permanent total disability benefits from November 4, 2002, through August 21, 2003, and denied Manson Special Fund relief. Connolly Pacific Company/Alaska National Insurance Company (Connolly) was found liable for temporary disability for two months following the brief period[1] he worked for Connolly after he had reached maximum medical improvement from his injuries at Manson.

Manson moved for reconsideration, repeating its contention that Connolly, not it, should be the responsible employer, and seeking relief under § 8(f) of the Act. Connolly and the Claimant respond that Dr. Marinow's deposition testimony proved there was no change in Claimant's underlying condition from the brief employment at Connolly, only a temporary flare-up of pain that resolved.

The Director claimed Manson waived any entitlement to § 8(f) relief when it failed to raise the issue in the pre-hearing statement (Form LS-18) it filed at the Office of Workers' Compensation Programs, and when it claimed in its Pre-Trial statement that the issue was most likely moot. If not moot, the Director claims that Manson failed to file a complete application, so that the absolute bar defense precludes relief. Manson responded that it submitted a complete § 8(f) application by mail or fax, and included declarations to support its argument that it had sent the required medical evidence to the Director. I find the application was complete, but do not alter my previous decision about Special Fund relief.

Claimant's two lawyers submitted their petitions for attorney's fees, to which Manson responded. This order also sets those fees.

[1] He worked for Connolly on February 28, 2003 and March 3-5, 2003.

I. Motion for Reconsideration

A. *Last Responsible Employer*

Manson urges that Connolly is the last responsible employer because Dr. Marinow's testimony does not indicate that Claimant returned to a "previous static condition," but his condition worsened after the "flare up" at Connolly. Motion at 1-2.

When an employment injury aggravates, accelerates or combines with a pre-existing condition to result in a new disability, the entire resulting disability is compensable by the employer liable for the "new" or aggravating injury. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* (*Price*), 339 F.3d 1102, 1105 (9th Cir. 2003); *Bath Iron Works Corp. v. Director, O.W.C.P.*, 244 F.3d 222, 228 (1st Cir. 2001) [*citing Foundation Constructors, Inc. v. Director, O.W.C.P.,* 950 F.2d 621, 624 (9th Cir. 1991)]. When the disability is the result of the natural progression of the prior injury and would have occurred notwithstanding the subsequent injury, the previous employer remains liable for the permanent disability, although the employer responsible for a subsequent injury may be responsible for a period of temporary disability. *Id.* That happened here.

In his second deposition, Dr. Marinow testified he assigned these prophylactic work restrictions after Claimant worked at Connolly: no reaching at or above shoulder level; no working on the knees for more than two hours per day; limited stair climbing, running, walking on hills, and no standing for more than six hours a day. (Marinow Second Depo. at 52-60). Manson sees them as proof that employment at Connolly permanently worsened Claimant's condition. Manson has misconstrued the testimony. Dr. Marinow gave those work restrictions because he "didn't think there was a change in the condition . . . [or any] worsening in the underlying condition in terms of new and further aggravation of injuries." (Marinow Second Depo. at 55-56). They reflected the doctor's original conclusion -- that a return to pile driving would only cause a flare up in the Claimant's underlying condition, not a change in it. (Marinow Second Depo. at 56). From his employment for four days at Connolly Claimant suffered the flare up Dr. Marinow predicted, but not any new or additional permanent disability.

Manson remains the last responsible employer. Connolly only bears liability for temporary total disability benefits after Claimant worked there until he returned to his baseline condition two months later.

B. *Section 8(f) Relief*

The Director offered no exhibits; he was not even represented at trial. The pre-trial Statement of Position filed on his behalf was argument, not proof of anything. Manson argues that he failed to prove either that (1) the absolute bar defense to Special Fund liability applies, as it is an affirmative defense that requires proof, or (2) that Manson's application for relief had not been fully documented. After considering Manson's declarations I have concluded it is more probable than not that its application was complete, and in the alternative that there was fault on both sides that would make it unfair to reject the application on the procedural basis the Director

advocates. Nonetheless the application is substantively inadequate, and no relief is due to Manson.

When the Director properly raises the Section 8(f)(3) defense, an adjudicator may not consider the merits of the employer's application without first considering whether the application filed with the district director was complete, fully documented or sufficient to satisfy the criteria of Section 8(f)(3) and the Secretary's implementing regulation. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998).

There was no need to reconvene the trial to make this determination, for the Nov. 5, 2004 Order Permitting Further Filings on Manson's Motion for Reconsideration gave the parties the opportunity to submit proof by affidavits. Manson submitted declarations supporting the arguments in its Reply to the District Director's Response to the Motion for Reconsideration. These showed the necessary medical reports were mailed to the District Director. Had the Director denied that these declarations were accurate, factual disputes would have been framed, and a post-trial hearing could have been set. The District Director did not request a hearing in its response to Manson's motion to allow it to serve a reply, so none was required. *Pigneret v. Boland Marine & Mfgr. Co.,* 656 F.2d 1091, 1095 (5th Cir. 1981) (en banc) (holding it is not error to determine a matter on the record when no party requests a hearing). The affidavits attached to Manson's reply are admitted into evidence.

"Fully documented" applications include both the grounds for Special Fund relief and supporting medical evidence. 20 C.F.R. § 702.321(a)(1); *Cajun Tubing Testors, Inc. v. Hargrave,* 951 F.2d 72, 74 (5th Cir. 1992). What the District Director received from Manson on April 28, 2003 by facsimile included no medical evidence. Manson mailed the original application (including the supporting medical reports it referenced) to District Director that same day. *See* the Declarations of Renee C. St. Clair and Jaimie M. Adams. This sort of separate service of medical reports is authorized in the fifth sentence of 20 C.F.R. § 702.321(b). In the Report of the Informal Conference dated May 8, 2003, Manson was given forty-five days to submit its medical proof, an indication that the medical evidence had not been received then. But that inference is overcome by the Report's reference to Dr. Marinow's medical records, a more compelling indication that they were available in the file. The deadline set for filing the medical evidence is problematic in itself. The due date for the records would have been June 22nd, well after jurisdiction was transferred to the Office of Administrative Law Judges on May 13, 2003. This deadline conflicted with the final sentence of 20 C.F.R. § 702.321(b)(2); it requires that Manson's time to complete the application must fall within the period the District Director has jurisdiction over the claim. At best fault on both sides (a confusing but sanctioned filing by the employer and an improper date set by the District Director to complete the application) would be sufficient to excuse any late filing. But the medical evidence had been served on the District Director.

Manson now has proven that it submitted these things to the Director by facsimile or served them by U. S. Mail on April 28, 2004, which constitute a complete Section 8(f) application:

Regulation	Threshold Requirement	Information Manson Provided
§ 702.321(a)(1)(i)	Specific description of preexisting condition	[Claimant's] L4-L5 fusion surgery in 1985
§ 702.321(a)(1)(ii)	Reasons for believing disability would be less but for prior impairment	Ongoing symptoms documented by Dr. Nelson and Dr. Marinow
§ 702.321(a)(1)(iii)	Basis for asserting that preexisting disability was manifest	X-rays performed by Dr. Marinow in November 2001, reveal changes to the spine from prior surgery
§ 702.321(a)(1)(iv)	Documentary medical evidence in support of request	Medical Reports of Dr. Nelson and Dr. Marinow, referenced in the Section 8(f) petition, served on the District Director on April 28, 2003, contained in the District Director's file, and served on the Solicitor on October 17, 2003.

I therefore alter the finding in my Decision that Manson did not submit the required medical evidence with its Section 8(f) petition. I withdraw the conclusion that the Director properly raised the absolute defense under Section 8(f)(3).

The Director claims that Manson is not entitled to Section 8(f) relief for other reasons. First, it failed to raise a claim for Section 8(f) relief as an issue in its Pre-Hearing statement (LS-18) dated June 16, 2003. Then in Manson's Pre-Trial statement, submitted October 17, 2003, the Director claims that Manson stated the issue of Section 8(f) relief was most likely "moot," given the last responsible employer issue. Finally, the Director states that Manson would not be entitled to Section 8(f) relief because it has not established a pre-existing disability or condition.

There is no requirement that issues be stated in filings as preliminary as an LS-18, on pain of waiver. Manson's mootness argument was merely a variation on its contention that Connelly was the last responsible employer, not a waiver of its claim for Section 8(f) relief.

To qualify for Section 8(f) relief, an employer must show that: (1) the employee had a pre-existing permanent partial disability; (2) this partial disability was manifest to the employer; and (3) the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." Section 8(f)(1); *Marine Power & Equipment v. Dep't of Labor*, 203 F.3d 664, 668 (9th Cir. 2000); *Director v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175 (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995), *appeal after remand*, 131 F.3d 1079 (4th Cir 1997).

Manson failed to prove that Claimant's 1985 and 1997 injuries made his current injury more serious than it otherwise would have been. In his report of the Claimant's November 12, 2001 examination, Dr. Marinow mentions Claimant's previous injuries, but found no relationship between them and Claimant's current condition. Dr. Nelson examined the Claimant and reported that he remained "symptomatic from the injur[ies]," but how those prior injuries affect his current condition is never explained. Their impact on or relationship to the injury at Manson is not something I can articulate from this record. Only by knowing what the injury at Manson alone would have been can I say whether the earlier injuries made things worse. That sort of proof is an essential element of Manson's application. *Harcum*, 8 F.3d at 185-186. Without establishing that relationship, Manson is ineligible for 8(f) relief.

Manson also implies that Claimant's prior injuries were so severe that it would not have hired him had it known about them. But that is not exactly what Manson argued. What it said was:

> "Had Manson Construction been aware of the nature, frequency and severity of Claimant's prior injuries and disability, they may not have been inclined to not[2] hire him." *See* its Reply to the District Director's Response to the Motion for Reconsideration, served Nov. 12, 2004, at 8, lns. 13-14.

This argument is insufficient to meet the cautious employer test of *C & P Telephone Co. v. Director, OWCP,* 564 F.2d 503, 513 (D.C. Cir. 1977). No one from Manson testified to a disinclination to hire the Claimant due to an increased risk of employment-related accidents or of increased liability for compensation benefits. The very argument is a tentative statement. Of course more information might have changed the hiring decision, but Manson has not proven its decision to hire Claimant *would have* been different.

II. Attorney's Fees

Claimant's attorneys, Mr. Sacks and Mr. Nizich, each filed fee petitions, to which Manson objected. After the parties met and attempted to resolve the objections, both supplemented their petitions. Manson made general objections and specific objections to their itemized charges. I address the general objections first.

A. *Claimant's Degree of Success*

Manson argues that Claimant achieved only a limited degree of success, which should be reflected in the fees. It claims Claimant was due compensation from at least one employer, and the difference between the average weekly wage offered by the employers' was minimal. Claimant received an increase of $1505.40 through the litigation by identifying Manson as the last responsible employer. Manson claims that even without this litigation, Claimant would have continued to receive compensation. But the matter came to trial because Manson controverted the liability claim.

[2] The second "not" is obviously an error.

Claimant's attorneys must successfully prosecute a claim to earn a fee under Section 28(a) [codified as 33 U.S.C. § 928(a)]; 20 C.F.R. § 702.134(a); *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982); *Rogers v. Ingalls Shipbuilding, Inc*., 28 BRBS 89 (1993). "Successful prosecution" includes establishing the claimant's right to past, present, or future medical benefits. *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 560 (9th Cir. 1990); *Ahmed v. Wash. Metro. Area Transit Auth*., 27 BRBS 24 (1993); *Maguire v. Todd Pac. Shipyards Corp.*, 25 BRBS 299 (1992). In Claimant's pre-trial statement (LS-18), Claimant listed the following as issues to be resolved:

> Temporary and permanent disability, nature and extent of injury, medical bills, interest, penalties, attorney's fees.

Manson's pre-trial statement of Jan. 23, 2004 stated that as of the time of trial Manson was providing neither compensation nor medical benefits to the Claimant. *See* its response to question 4 (g).

Although Connolly was potentially liable, Manson was ultimately found liable for 1) Claimant's permanent total disability benefits from November 4, 2002 through August 21, 2003; 2) Claimant's permanent partial disability benefits beginning August 22, 2003 and continuing; and 3) Claimant's past and future medical expenses.[3] Manson does not claim it ever agreed that a compensation order should be entered against it, which is the most significant thing Claimant obtained in this adjudication. Claimant was not currently being compensated by Manson, and was in a precarious situation while Manson denied it was the liable employer, for even if Manson made voluntary payments, it could have stopped its payments at any time. That Claimant only received $1,505.40 more than he would have if Connolly had been named the last responsible employer hardly shows Claimant met with limited success in prosecuting his claim. The specific dollar amount obtained from one employer or another is not the measure of successful prosecution. The right to future medical care under § 7 certainly is valuable but difficult to quantify. He also has an ongoing weekly wage loss that Manson must pay. Even if the recovery were small, that is not a basis to reduce a fee. *Rogers*, 28 BRBS at 93.

Manson argues that since both Connolly and Manson were found liable for Claimant's injuries, Claimant was not successful in prosecuting its case against Manson. A successful prosecution does not require a liability finding against only one employer. The largest portion of the liability has been allocated to Manson. Claimant prevailed on all of the issues identified in the pre-trial statement, except interest and penalties, which is more than "limited" success. Claimant's attorney fees shall not be reduced on this basis.

B. *Duplicative Fee Requests*

1. Joinder of Mr. Nizich as counsel

Manson claims that this case was not unduly complex, so two attorneys – Mr. Sacks and Mr. Nizich – were unnecessary. Manson contends that Mr. Nizich's only role in this matter was

[3] Claimant received compensation for his past medical expenses, disability benefits, and the right to future medical care from Manson, Manson reimbursed Connolly for Claimant's past medical expenses and disability benefits.

to discredit the vocational expert, Mr. Johnson. Manson argues that Mr. Nizich's work was duplicative and that Manson should not be liable for his fees.

The Board has stated that there is nothing objectionable about more than one attorney participating in litigation when warranted by complexity or other factors. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *affirmed mem.*, 202 F.3d 259 (4th Cir. 1999). A recent Ninth Circuit case stated that courts should exercise "judgment and discretion" in evaluating whether the services of multiple attorneys was necessary or just duplicative. *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281 (9th Cir. 2004). The Ninth Circuit gave examples of services that could not be billed when more than one attorney is retained. Attorneys cannot bill for time when they are "merely watch[ing the proceedings] so that they can learn and use their knowledge in subsequent cases." Mr. Nizich's was no mere bystander. He actively participated in this prosecution, specifically by the cross-examination of Mr. Paul Johnson, and by attending the depositions of Drs. Delman and London. It was not improper for Mr. Nizich to be involved in the claim, and he shall be allowed to recover his reasonable fees.

2. Other Duplicative Services

Mr. Nizich and Mr. Sacks may not duplicate billings for services performed. I note the following charges billed by Mr. Sacks:

2/20/04	1.00	Prepare Cross-Exam of Dr. London
2/20/04	.50	Prepare Cross-Exam of Dr. Delman

Since these witnesses did not appear at trial, these items appear to have been in preparation for the depositions of Drs. London and Delman. However, as Manson accurately points out, Mr. Sacks did not appear at the depositions of Drs. Delman and London. Additionally, Mr. Nizich, who did attend the Doctors' depositions, billed his time spent in preparation for them. Only one attorney may bill for deposition preparation. Accordingly, Mr. Sacks will not receive compensation for preparing the cross-examination of Drs. London and Delman.

C. *Hourly Billing Rate*

Manson argues that the issues in this case were not unusually complex so that the hourly billing rate of $239 is excessive; it suggests an hourly rate of $210.

Courts apply the many fee-shifting statutes granting "reasonable attorney's fees" similarly. *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 & n. 10 (9th Cir. 1986). The rate due is not what a hypothetical lawyer in the forum demands to try cases, but what the petitioning lawyer actually earns for legal work. *Id*. Mr. Sacks states that his hourly billing rate ranged from $250-$300 per hour in 2003-4, but is asking for an hourly rate of $239 in this matter. The support for his rates is his declaration. Mr. Nizich does not claim he has a regular hourly billing rate. He requests an hourly rate of $239

based on his twenty three years of longshore experience and offers his fee award in *Lorimer v. Great Lakes Dredge & Dry Dock Dir.*, 1999-LHC-1884, as support for his hourly rate of $239.[4]

A longshore employer may counter the hourly rate a prevailing claimant's lawyer seeks with proof of the customary fee for similar services in the local community. *Monahan v. Portland Stevedoring Co.*, 8 BRBS 653 (1978). Manson cites *Melgoza v. Stevedoring Services of Am.,* 36 BRBS 740 (ALJ 2002), in which the attorneys, one of whom was Mr. Nizich, were awarded an hourly rate of $205 as reasonable and commensurate with what other attorney's with similar experience in the Long Beach area earn. But *Melgoza* was decided in 2002, not recently. Manson implies that because Mr. Nizich was associated as counsel at one point with *Melgoza*, $205 is his standard rate. This is not necessarily true. Furthermore, in *Melgoza*, Mr. Nizich only served as counsel for part of the time. Therefore, Manson has not provided an evidentiary basis for the $210 hourly rate it suggests. *See Davis v. City and County of S.F.*, 976 F.2d 1536, 1547 (9th Cir. 1992).

Thus, the best indication of an appropriate hourly rate in this case is what judges in this office award for competent and efficient legal work. The rate currently hovers around $225 to $250 per hour in major West Coast cities. Since this case was litigated competently and efficiently by both attorneys, I award an hourly rate of $235 for both Mr. Nizich and Mr. Sacks.

D. *Excessive Itemized Fee Requests*

Objections to use of quarter-hour minimum billing increments.

An ALJ has the discretion to accept quarter-hour billing. *Snowden v. Ingalls Shipbuilding, Inc*., 25 BRBS 245, 252, *affirmed in pertinent part,* 25 BRBS 346 (en banc)(1991). Quarter-hour billing increments have been reduced for "small or standard tasks," when the increment did not accurately reflect the work performed. *Villarreal v. Copper/T. Smith, Inc*., 30 BRBS 447, 449 (ALJ 1996). Additionally, a judge has rejected the quarter-hour minimum billing increments for small tasks such as telephone calls. *Burkhammer v. Container Stevedoring*, 27 BRBS 754 (ALJ 1994). Manson asks that the fee requests for brief or standard tasks be reduced to from one-quarter to a one-eighth hour. Additionally, Manson requests that many .50 hour requests be reduced.

I am not convinced that all billings for phone calls and small or standard tasks, or any identifiable part of them, are overstated so I will not grant the wholesale reduction sought. Manson did provide specific opposition to Mr. Sacks' fee requests for:

6/16/03	.50	Letter to Opposing Counsel Re RX
7/03/03	.50	Letter to Court Clerk ALJ
11/20/03	.50	Letter to Opposing Counsel Re [Interrogatory] Answers

The first of those letters was two paragraphs and four sentences long, it should not have taken half an hour to write. Mr. Sacks' July 3, 2003 letter to the clerk consisted of two sentences and it too should not have taken one-half an hour to write. Finally, Manson contends that the 11/21/03

[4] In *Lorimer v. Great Lakes Dredge & Dry Dock Dir.*, Mr. Nizich was awarded an hourly rate of $225.

letter to opposing counsel regarding interrogatory answers was only two paragraphs long and could not have taken one-half hour to write. These are valid objections; the time charges for writing each of these three letters are reduced to .25 hour. *See, Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42, 44 & n. 5 (1995).

In addition, these charges were billed by Mr. Sacks:

09/21/04	.50	Letter to Dr. Marinow w/copy of Expected ALJ Award
09/21/04	.50	Letter to Client w/copy of Expected ALJ Award
10/08/04	.50	Letter to Clerk, transmit Opposition

I also find these entries too large. I do not have copies of the correspondence that Mr. Sacks sent to Dr. Marinow and Claimant, but I find it unlikely that it took him an hour to write two letters, each consisting of the same explanation of the award. Considering the similar function of both letters, I reduce the time charges for the letter to the client to .25 hour. Next, Mr. Sacks has requested half an hour for writing a letter to the clerk and transmitting the opposition. Time spent on traditional clerical duties by an attorney is not compensable and cannot be included as part of the attorney's reported hours. *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980) [incorporating guidelines set forth in *Marcum v. Director, O.W.C.P.*, 12 BRBS 355 (1980)]. Transmitting the opposition is a clerical function, so I reduce that time charges to .25 hour.

With respect to Manson's other objections, they are vague and do not provide specific objections to quarter hour billings by Mr. Nizich and Mr. Sacks. I do not reduce the remainder of Mr. Nizich and Mr. Sacks' fee requests.

Objection to Specific Billing Entries in the Supplemental Petitions

Manson objects to these charges in Mr. Sacks' and Mr. Nizich's Supplemental Fee Petitions.

Mr. Sacks

11/02/04	.75	Review & analyze Manson fee objection
11/02/04	.50	Legal research of Manson cites in objection
11/02/04	2.50	Dictate first draft of reply to fee objection
11/04/02	5.25	Letter to Atty Ponticello re conference call on fee issues; prepare revised draft reply; Further legal research and analysis of cases cited by Manson and related to fee issue
11/05/04	.50	Review Manson motion for reply and Director response
11/08/04	1.25	Prepare revised reply to fee objections
11/09/04	1.25	Prepare final reply to Manson objections to fee issues; prepare Supplemental fee petition
11/10/04	.50	Letter to clerk to file Reply and Supplemental Fee Petition

Mr. Nizich

10/25/04	.75	Receive, review & make notes of Employer's Objection to Claimant Fee Petition
10/26/04	2.25	Legal Research re Employer objection to fees
1/03/04	.75	Cull through file to respond to employer objection to documents claimed not received
11/04/04	.25	Claimant's draft of reply to objection to fee petition
11/08/04		Telephone conference with Atty. Sacks and Ponticello re objection to fee petitions

Many of Manson's objections were repetitive and unpersuasive. The charges for legal research and writing are excessive. The letter to the clerk written by Mr. Sacks on November 10, 2003, to file Claimant's reply and the Supplemental Fee Petition is only one sentence and should not have taken one-half hour. Therefore, I reduce Mr. Sacks' hours billable to Manson for these specific charges from thirteen to eight.

Manson also objects to the time Mr. Nizich's billed to reply to Manson's objections. Mr. Nizich requests a total of four hours. Of this, the two and one quarter hours allotted to legal research is excessive, especially since Mr. Sacks has also billed considerable time to legal research related to the fee petition. I reduce this charge to one hour.

I also noted the following charges billed by Mr. Sacks:

7/30/03	1.00	Conference paralegal – Assemble Med. Exhs.

Time spent on traditional clerical duties by an attorney is not compensable and cannot be included as part of the attorney's reported number of hours. *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980) (incorporating guidelines set forth in *Marcum v. Director, O.W.C.P.*, 12 BRBS 355 (1980)). Therefore, Mr. Sacks cannot bill for this time.

Manson makes two general, recurring objections to Claimant's attorney fee petitions.

1) Respondent objects to this fee as excessive and not commensurate with an activity leading to the successful prosecution of this claim. Claimant's counsel objected to the joinder of Connolly Pacific, which joinder was ultimately granted. Therefore, this was not an activity upon which Claimant's counsel was successful, such that fees should not be awarded.
2) Respondent objects to this fee request in its entirety. The fee request is in regard to activities relating to co-defendant Connolly Construction, and does not represent activities with regard to any successful prosecution of any claim against Manson . . .

I reject them. Manson says that since Claimant unsuccessfully objected to Connolly's joinder, Claimant's attorneys should not receive compensation for time spent litigating that issue. Next, it claims that Claimant's attorneys should not be compensated for time spent on activities

relating to Connolly after it became a party to the litigation. This parsing of success and failure goes too far. I would not evaluate whether each objection made at trial was sustained or overruled, and pay only for time spent on objections that were sustained. There is no principled basis for making motion by motion assessments of success either[5]. According to Manson, Claimant should not have spent any time litigating the possible joinder of Connolly, and once Connolly had joined, Claimant should not have reviewed documents from Connolly or communicated with Connolly's attorneys. This position is especially puzzling given that Manson was the party that brought Connolly into this litigation, not Claimant. Once Connolly became a party, Claimant had no choice but to litigate against both Manson and Connolly. All activities relating to Connolly before and after it became a party will be reimbursed. They are related to the successful prosecution of this claim.

Many of Manson's objections are that billings are for "small standard task[s]," and require a more detailed explanation to merit the time billed. Unless there appears to be bill-padding, it makes little sense to require detailed explanations of small tasks. In the majority of situations, Manson has merely stated boilerplate objections to Claimant's attorneys' fees requests as opposed to specific objections. Accordingly, except for those items specifically noted above, the fees are approved.

E. *Undocumented that are office overhead*

Mr. Sacks requests costs in the amount of $1,449.62. Of these charges, $163.50 are fax charges. Manson objects to them as part of general office overhead. For example, individually billed toll telephone calls related to a case would be recoverable cost items, but local telephone calls cannot be billed by charging some percentage of the flat monthly charge a lawyer pays for local lines. *Picnich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989), allows an employer to challenge costs that are unnecessary or reasonable. Neither Mr. Nizich nor Mr. Sacks showed that they paid anything out of pocket to send or receive these faxes. Without this type of evidence, faxes ought to be subsumed in office overhead.

Mr. Sacks also requests $150 for Westlaw legal research charges. On-line legal research costs have been held to be overhead. *Migis v. Pearle Vision, Inc*., 944 F.Supp. 508, 518 (N.D. Tex. 1996), *affirm in part*, *rev'd in part on other grounds,* 135 F.3d 1041, 1049 (5th Cir. 1998). Yet unlike the fax charges, these are specific billings from a third party, so they resemble charges for telephone toll calls. In the absence of proof that it is typical practice in the area to pass on legal research charges directly to hourly clients, the $150 charge cannot be billed to Manson. I treat this as something already factored into the hourly rate, like rent. Costs are reduced to $1,136.12.

[5] I do not imply that time spent on a frivolous motion could not be deducted, but none were filed here.

ORDER

The request for reconsideration is denied. Attorney's fees for 69 hours for Mr. Nizich at the hourly rate of $235 (totaling $16,215.00) and 167 hours for Mr. Sacks at the same rate (totaling $39,235.00) are approved. Costs of $1,136.12 also are approved.

A

WILLIAM DORSEY
Administrative Law Judge

WRD